Supreme Court, U.S.
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In The

Supreme Court of the United States

RUBEN GOMEZ-CHAVEZ,

Petitioner,

v.

BRIAN PERRYMAN, District Director,
and the
IMMIGRATION AND NATURALIZATION SERVICE,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Seventh Circuit Court of Appeals was correct in affirming the District Court's Order dismissing the Complaint for Mandamus, Declaratory Judgment, and Injunction, thereby circumventing the constitutionality of 8 U.S.C. § 1231(a)(5).

2. Whether the District Court's denial of the Petition For Leave To File First Amended Complaint adding a Habeas Corpus claim was properly affirmed by the Seventh Circuit Court of Appeals.

3. Whether the Seventh Circuit Court of Appeals' assessment that 8 U.S.C. § 1231(a)(5) and the prior removal reinstatement procedure does not deny Petitioner due process of law and does not violate the Due Process Clause of the Fifth Amendment to the United States Constitution was correct and whether such a determination is inconsistent with the Ninth Circuit Court of Appeals' position on the same issue.

PARTIES TO THE PROCEEDINGS

Including the parties named in the caption of this Petition, the parties are:

Petitioner: Ruben Gomez-Chavez, an individual.

Respondents: Brian Perryman, District Director of the Immigration and Naturalization Service; and

Immigration and Naturalization Service, a governmental division of the United States Department of Justice (known as the Bureau of Citizenship and Immigration Services as of March 1, 2003).

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PETITION FOR A WRIT OF CERTIORARI

RUBEN GOMEZ-CHAVEZ, Petitioner, by undersigned counsel, under appropriate rules of this Court, requests that this Honorable Court issue a writ of certiorari to the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

Pursuant to Supreme Court Rule 14.1(d), the citation of the official report of the opinion below is: *Gomez-Chavez v. Perryman*, 308 F.3d 796 (7th Cir. 2002).

This is an immigration case that began to take life nearly four years ago when the Petitioner was expeditiously removed from the United States following an attempt to enter the United States with the use of false documents. After reentering the United States and marrying a United States citizen, Petitioner filed a form I-130 (petition to classify status of alien as an immediate family member of a United States citizen) and a form I-485 (petition to adjust status to an alien lawfully admitted for permanent residence). At an Immigration and Naturalization Service (hereinafter "INS") interview for the foregoing applications, Petitioner was found to have entered the country illegally, and a Reinstatement Order of a prior Removal Order was decreed on the Petitioner. Petitioner was arrested and detained on that day, July 18, 2001. Fortunately, Petitioner was released the following day and ordered to report back to the INS on August 2, 2001, for removal without a hearing pursuant to 8 C.F.R. § 241.8.

At this point, Petitioner filed, *inter alia*, a Complaint for Mandamus, Declaratory Judgment, and Injunction

with the United States District Court for the Northern District of Illinois on July 25, 2001. The Honorable Judge Conlon of the Northern District of Illinois dismissed the complaint for lack of subject matter jurisdiction on August 8, 2001, indicating that jurisdiction may lie with the Court of Appeals for the Seventh Circuit. The Petitioner then filed a Petition for Review with the United States Court of Appeals for the Seventh Circuit; unfortunately, that court also dismissed for lack of jurisdiction, basing such a decision on the dictates of 8 U.S.C. § 1252(g). Subsequently, on August 9, 2001, Petitioner filed a Petition for Leave to File a First Amended Complaint adding a Habeas Corpus claim and a Motion to Reconsider in the District Court for the Northern District of Illinois. Both requests, however, were denied on August 21, 2001 and September 7, 2001, respectively.

On September 17, 2001, Petitioner filed a Notice of Appeal and a Petition for Review from the decision of the district court dismissing the Petitioner's complaint for lack of jurisdiction and denial of amendment of complaint. The Court of Appeals for the Seventh Circuit recalled the mandate in the prior order (Case No. 01-3068, dismissing for lack of jurisdiction in the court of appeals on the basis of 8 U.S.C. § 1252(g)) and on the merits declined to disturb the INS order reinstating the prior removal order. In addition, the court of appeals affirmed the district court's order (Case No. 01-3454) dismissing the complaint for Mandamus, Declaratory Judgment and Injunction. Finally, on November 25, 2002, Petitioner filed with the Seventh Circuit Court of Appeals a Petition for Rehearing of the entry of judgment dated October 24, 2002. The Court

summarily denied the Petition for Rehearing on December 11, 2002.

JURISDICTIONAL STATEMENT

Pursuant to Supreme Court Rule 14(1)(e)(i), the date the judgment or order sought to be reviewed was entered on October 24, 2002 by the United States Court of Appeals for the Seventh Circuit.

Furthermore, pursuant to Supreme Court Rule 14(1)(e)(ii), a Petition for Rehearing was denied on December 11, 2002.

Moreover, according to Supreme Court Rule 14(1)(e)(iv), the statutory provision believed to confer on this Court jurisdiction to review on a writ of certiorari the judgment or order in question is 28 U.S.C. § 1254(1).

The United States Court of Appeals for the Seventh Circuit had jurisdiction based on 28 U.S.C. § 1291.

CITATIONS OF RELEVANT PROVISIONS, STATUTES, AND REGULATIONS

I. The relevant constitutional provisions involved in the case, pursuant to Supreme Court Rule 14(1)(f), include:

The Fifth Amendment to the United States Constitution.

II. The relevant statutes involved in the case, pursuant to Supreme Court Rule 14(1)(f), include:

8 U.S.C. § 1225(b)(1)(A)(i);

8 U.S.C. § 1231(a)(5);

8 U.S.C. § 1252(g);

28 U.S.C. § 1331; and

28 U.S.C. § 1361.

III. The relevant regulations involved in the case, pursuant to Supreme Court Rule 14(1)(f), include:

8 C.F.R. § 241.8(a), (b), and (c).

STATEMENT OF THE CASE

This is an immigration case which raises novel issues concerning the application of the reinstatement provision of the Immigration and Nationality Act (hereinafter "INA") § 241(a)(5), 8 U.S.C. § 1231(a)(5), as amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub.L. 104-208, Div. C, 110 Stat. 3009-546 (hereinafter "IIRIRA") to Petitioner. On or about January 30, 1999, Petitioner, a Mexican National, was found inadmissible and detained by an Immigration Officer in Dallas, Texas, and was ordered removed from the United States pursuant to 8 U.S.C. § 1225(b)(1). (R1 at 2). Accordingly, that section of the United States Code permits immigration officers to order aliens removed without further hearings or review unless the alien indicates an intention to apply for asylum. (R1 at 2). *See also* (App. 23a). Neither an attorney nor translator was present with Petitioner at the time of the expedited removal proceedings in the presence of the Immigration Officer on January 30, 1999. (R1 at 2). Petitioner was deported that very same day without ever receiving an administrative or judicial hearing. (R1 at 2). Shortly after deportation, Petitioner reentered the United

States without inspection, and on March 5, 1999, married a United States citizen, Sonia Martinez, in the State of Illinois. (R1 at 2). Approximately, two months following the marriage, Martinez filed with the INS a form I-130 petition (incorrectly designated as "I-30" in the Seventh Circuit Court of Appeals' decision, *see* App. 3a) to classify the status of the Petitioner as an immediate family member of a United States citizen. Simultaneously, the Petitioner and his U.S. citizen spouse filed with the INS a form I-485 application along with other forms to adjust Petitioner's status to that of an alien lawfully admitted for permanent residence. (R1 at 2).

On June 1, 1999, the INS issued an "Employment Authorization Card" to Petitioner, and subsequently renewed said card on April 20, 2000, and April 5, 2001, respectively. (R1 at 3). Petitioner and his citizen spouse attended an interview held at the Chicago, Illinois INS office on July 18, 2001, and said interview was conducted by one of the Respondents' agents. (R1 at 3). At this point, the INS agent arrested the Petitioner based on the illegal reentry, which resulted in immediate reinstatement of his prior Removal Order of January 30, 1999. The INS agent did not send the Petitioner to an immigration judge or any other neutral body, and decided to deport him without judicial review. (R1 at 3).

On July 19, 2001, Petitioner was released from INS custody, and was ordered to report back to the INS on August 2, 2001, for removal without a hearing pursuant to 8 C.F.R. § 241.8. Although Petitioner was not a convicted criminal, he was placed in INS custody for more than eighty days. (R3 at 5).

On July 25, 2001, Petitioner filed an I-212 application with Respondents for permission to reapply for admission into the United States after removal. (R3 at 5). The very same day, Petitioner filed a Complaint for Mandamus, Declaratory Judgment and Injunction in the District Court for the Northern District of Illinois, Case No. 01 C 5768. (R1). On August 8, 2001, the district court dismissed the complaint for lack of jurisdiction, indicating that all challenges to removals belong in the court of appeals upon a timely petition for review. (R6). *See also* (App. 5a). Immediately following the dismissal, Petitioner filed a petition for review from the district court's decision in the Court of Appeals for the Seventh Circuit, which was assigned Case No. 01-3068. *See generally* (App. 4a).

On August 9, 2001, the court of appeals dismissed the petition for lack of jurisdiction, and later clarified that decision by stating that the INS's decision of July 18, 2001 "constitute[d] a decision of the Attorney General to execute a removal order and therefore this court's jurisdiction [wa]s barred by 8 U.S.C. § 1252(g)." *See generally* (App. 4a). Having no venue to entertain his constitutional claims, on August 14, 2001, Petitioner returned to the district court, asking it to reconsider its decision in light of the court of appeals' ruling. *Id.* On August 21, 2001, the district court denied his motion to reconsider (R10) and on September 7, 2001, it denied his motion for leave to file a first amended complaint (which added a claim of Habeas Corpus) (R12).

Frustrated with the seemingly closed doors of justice, Petitioner filed a Notice of Appeal and Petition for Review from the decisions of the district court dismissing the Petitioner's complaint for lack of jurisdiction and denying him a right to amend his complaint. (R13). On October 24,

2002, the court of appeals recalled the mandate in the prior order (Case No. 01-3068) and on the merits declined to disturb the INS order reinstating the removal order. (App. 11a). Also, the court of appeals summarily affirmed the district court's order dismissing the Complaint for Mandamus, Declaratory Judgment and Injunction (Case No. 01-3453). *Id.* In its decision, the court of appeals agreed that Petitioner's challenge to the INS's July 19, 2001 removal order was jurisdictionally correct in the court of appeals, but it concluded that "nothing he [the Petitioner] ha[d] presented entitle[d] him to relief from the INS order." (App. 6a). In denying Petitioner his request, the court, in its determination of the constitutionality of the reinstatement procedure, noted that the Petitioner "can have no liberty interest in remaining in violation of applicable United States law." (App. 8a). The Court of Appeals amended the Order of October 24, 2002 by slightly altering descriptions of the case. (App. 14a-15a).

Finally, on November 25, 2002, Petitioner filed a Petition for Rehearing of the entry of judgment dated October 24, 2002; however, this petition was denied on December 11, 2002. (App. 22a).

REASONS FOR GRANTING WRIT

I. NEITHER THE COURT OF APPEALS, NOR THE DISTRICT COURT ENTERTAINED PETITIONER'S CONSTITUTIONALITY CLAIM AGAINST 8 U.S.C. § 1231(a)(5)

A. The Seventh Circuit Court of Appeals Was Incorrect in Affirming the District Court's Dismissal of Petitioner's Complaint for Writ of Mandamus, Declaratory Judgment, and Injunction for Lack of Jurisdiction

First and foremost, "[t]he district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331. Moreover, statutory restrictions on jurisdiction are construed narrowly, and courts will not assume that jurisdiction has been repealed unless the statute says so explicitly. *McNary v. Haitian Refugee Ctr.*, 498 U.S. 479, 496, 111 S.Ct. 888, 112 L.Ed.2d 1005 (1991); *see also*, *Bowen v. Michigan Acad. of Family Physicians*, 476 U.S. 667, 670-72, 106 S.Ct. 2133, 90 L.Ed.2d 623 (1986).

According to 28 U.S.C. § 1361, the "district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff." 28 U.S.C. § 1361. Section 1252(g) of Title 8 of the United States Code may deprive federal jurisdiction over certain removal actions, but this section does not strip the courts of jurisdiction over actions involving the adjudication of applications filed by immigrants. *See generally*, *INS v. St. Cyr*, 533 U.S. 289, 121 S.Ct. 2271 (2001) and *Reno v. A.A.D.C.*, 525 U.S. 471, 119 S.Ct. 936, 142 L.Ed.2d 940 (1999).

As a preliminary matter, Petitioner Ruben Gomez-Chavez does not challenge that 8 U.S.C. § 1252(g) bars courts from reviewing discretionary decisions to "commence proceedings, adjudicate cases, or execute removal orders." (App. 24a). Furthermore, Petitioner agrees that he is an "alien attempting to achieve judicial review" of the Attorney General's discretionary decision, as contemplated by 8 U.S.C. § 1252(g). (App. 6a). However, Petitioner was also attempting to exercise his due process rights (explained *infra* Section IB) by searching for a venue to hear his constitutional claim on the validity of his removal without a full and fair hearing *and* the constitutionality of 8 U.S.C. § 1231(a)(5). Therefore, in stark opposition to the court of appeals' categorization of Petitioner's cause of action, Petitioner is not "[a]n alien attempting to achieve judicial review of such discretionary measures" who is "avoid[ing] the § 1252(g) bar by the simple expedient of recharacterizing a claim as one challenging a refusal to act." (App. 6a).

Petitioner was not only attempting to force the Attorney General to adjudicate his INS form I-212 (the mandamus count), he was also attempting to challenge the constitutionality of 8 U.S.C. § 1231(a)(5) (the declaratory judgment count) and to receive an injunction. (R1). The entire complaint was dismissed for lack of jurisdiction, and subsequently affirmed by the court of appeals, which noted that Petitioner could not avoid § 1252(g)'s jurisdictional bar by recharacterizing a claim as a request for writ of mandamus. (App. 6a). However, that was merely one portion of the complaint; Petitioner's constitutionality claim of § 1231(a)(5) was ignored. The court of appeals thus affirmed the district court's ruling that his entire complaint was barred by § 1252(g). (App. 13a). Although the court of appeals entertained Petitioner's claim of the

constitutionality of his removal without a full and fair hearing (*see infra*, Section II), and merely limited this due process analysis to the reinstatement procedure itself, it nonetheless summarily affirmed the district court's dismissal of the complaint which included the *constitutionality of § 1231(a)(5)*. As noted *supra*, 28 U.S.C. § 1331, the district court had jurisdiction to hear, at minimum, the portion of Petitioner's complaint regarding the constitutionality of § 1231(a)(5) since such an action arose under a law of the United States. It follows then that the court of appeals was incorrect in affirming the district court's dismissal of Petitioner's Complaint for Mandamus, Declaratory Judgment, and Injunction for lack of jurisdiction.

B. The Seventh Circuit Court of Appeals Was Incorrect in Affirming the District Court's Dismissal Which Included the Petition For Leave To File First Amended Complaint Adding a Habeas Corpus Claim

In order to avoid a jurisdictional challenge of the "in custody" requirements of the habeas statute, a petitioner need only be "in custody" at the time the petition was filed. *Smith v. Ashcroft*, 295 F.3d 425, 428 (4th Cir. 2002) (*citing Chong v. INS*, 264 F.3d 378, 382-83 (3d Cir. 2001) and *Carafas v. LaVallee*, 391 U.S. 234, 238, 88 S.Ct. 1556, 20 L.Ed.2d 554 (1968)). Furthermore, in *Carafas*, this Honorable Court

> held that where the petitioner was in custody at the time the petition was filed, his release from prison before the petition for certiorari was filed did not moot the case because petitioner could still suffer 'serious disabilities because of the law's complexities and not because of his fault, if his claim that he has been illegally convicted is meritorious.'

Smith v. Ashcroft, 295 F.3d at 428 (*quoting Carafas v. LaVallee*, 391 U.S. at 239). The Court of Appeals for the Fourth Circuit, basing it's decision on *Carafas*, held that it had jurisdiction to hear petitioner's habeas corpus claim (brought pursuant to 28 U.S.C. § 2254) to challenge the reinstatement of a prior removal order under 8 U.S.C. § 1231(a)(5) of removing him without a hearing. *Smith v. Ashcroft*, 295 F.3d 425 at 427, 428. The petitioner had challenged the reinstatement of his prior removal order by filing the habeas petition with the district court, which later dismissed without elaboration. *Id.*

In the case at bar, Petitioner originally had filed a Complaint for Mandamus, Declaratory Judgment, and Injunction in the district court, which was ultimately dismissed for lack of jurisdiction on August 8, 2001. (App. 21a). Moreover, on August 14, 2001, Petitioner petitioned the district court for leave to file a First Amended Complaint adding a habeas corpus claim pursuant to 28 U.S.C. § 2241, which was ultimately denied as "futile" on September 7, 2001. (App. 5a, *See also* R14). The Court of Appeals for the Seventh Circuit affirmed the district court's dismissal of the case, and did not remand the case to the district court to hear the Petitioner's petition for habeas corpus, even though Petitioner was in custody at the time of the petition. This is an erroneous conclusion since under 28 U.S.C. § 2241, the district courts do have jurisdiction to hear habeas corpus petitions. *See* 28 U.S.C. § 2241. Furthermore, the conclusion of the court of appeals affirming the dismissal, and the conclusion of the district court denying the habeas corpus claim as "futile," is antagonistic to this Honorable Court's holding in *Carafas* and the Fourth Circuit Court of Appeals' reasoning in *Smith v. Ashcroft*, *supra*.

II. THE SEVENTH CIRCUIT COURT OF APPEALS' CONCLUSION THAT PETITIONER'S REMOVAL WITHOUT A HEARING DOES NOT VIOLATE HIS DUE PROCESS RIGHTS UNDER THE FIFTH AMENDMENT IS CONTRARY TO THE NINTH CIRCUIT COURT OF APPEALS' POSITION

This Honorable Court in *Zadvydas v. Davis*, 533 U.S. 678, 121 S.Ct. 2491 (2001), when discussing the post-removal-period detention statute (8 U.S.C. § 1231(a)(6)), stated that the Constitution may well preclude granting "an administrative body the unreviewable authority to make determinations implicating fundamental rights." *Zadvydas*, 533 U.S. at 692 (*citing Superintendent, Mass. Correctional Inst. At Walpole v. Hill*, 472 U.S. 445, 450, 105 S.Ct. 2768 (1985) (O'Connor, J.)). Once an alien enters the country, the legal circumstance changes, because the Due Process Clause applies to *all persons* within the United States, *including aliens*, whether their presence is lawful, *unlawful*, temporary, or permanent. *Id.* at 693 (*citing Plyler v. Doe*, 457 U.S. 202, 210, 102 S.Ct. 2382, 72 L.Ed.2d 786 (1982) (emphasis added); *Mathews v. Diaz*, 426 U.S. 67, 77, 96 S.Ct. 1883, 48 L.Ed.2d 478 (1976); *Kwong Hai Chew v. Colding*, 344 U.S. 590, 596-598, and n.5, 73 S.Ct. 472, 97 L.Ed.2d 576 (1953); *Yick Wo v. Hopkins*, 118 U.S. 356, 369, 6 S.Ct. 1064, 30 L.Ed. 220 (1886)). It is well established that the Fifth Amendment entitles aliens to due process of law in deportation proceedings. *Reno v. Flores*, 507 U.S. 292, 307, 113 S.Ct. 1439, 123 L.Ed.2d 1 (1993). Moreover, the majority in *Zadvydas* noted that "[a]liens who have once passed through our gates, even *illegally*, may be expelled *only* after proceedings conforming to traditional standards of fairness encompassed in due process of law." *Zadvydas*, 533 U.S. at

693 (*quoting Shaughnessy v. U.S. ex rel. Mezei*, 345 U.S. 206 at 212, 73 S.Ct. 625, 97 L.Ed. 956 (1953) (emphasis added).

Cases holding that because Congress has "plenary power" to create immigration law, the Judicial Branch must defer to Executive and Legislative Branch decision-making in that area, did not help the Government's position (of the constitutionality of the indefinite detention statute) since that power is subject to important constitutional limits. *Zadvydas*, 533 U.S. at 695 (*citing INS v. Chadha*, 462 U.S. 919, 941-942, 103 S.Ct. 2764, 77 L.Ed.2d 317 (1983); *The Chinese Exclusion Case*, 130 U.S. 581, 604, 9 S.Ct. 623, 32 L.Ed. 1068 (1889).

In *Bridges v. Wixon*, 326 U.S. 135, 65 S.Ct. 1443, 89 L.Ed. 2103 (1945), this Court discussed the seriousness of deportation while deciding that the detention of a Communist Party affiliator was unlawful as contemplated under § 23 of the Alien Registration Act of 1940, 54 Stat. 673, 8 U.S.C. § 137. *See*, *Bridges*, 65 S.Ct. 1443 (1945). Specifically, this Court stated that " . . . it must be remembered that although deportation technically is not criminal punishment, it may nevertheless visit as great a hardship as the deprivation of the right to pursue a vocation or a calling." *Id.* at 1449 (*citing Johannessen v. U.S.*, 225 U.S. 227, 242, 32 S.Ct. 613, 617, 56 L.Ed. 1066 (1912); *Bugajewitz v. Adams*, 228 U.S. 585, 591, 33 S.Ct. 607, 608, 57 L.Ed. 978 (1913); *Mahler v. Eby*, 264 U.S. 32, 39, 44 S.Ct. 283, 286, 68 L.Ed. 549 (1924). The majority opinion reiterated Mr. Justice Brandeis' comment in *Ng Fung Ho v. White*, 259 U.S. 276, 284, 42 S.Ct. 492, 495, 66 L.Ed. 938 (1922), that deportation may result in the loss "of all that makes life worth living." *Bridges*, 65 S.Ct. at 1449. In Justice Murphy's concurrence, a discussion of the alien's

proceeding (and the constitutionality of 8 U.S.C. § 137) resulted in the following:

> When the immutable freedoms guaranteed by the Bill of Rights have been so openly and concededly ignored, the full wrath of constitutional condemnation descends upon the action taken by the Government. And only by expressing that wrath can we give form and substance to the 'great, the indispensable democratic freedoms'. . . . The unconstitutionality of the statute in issue and the invalidity of the proceeding brought pursuant thereto are obvious. As construed and applied in this case, the statute calls for the deportation of [the alien] after a fair hearing in which 'some' evidence is established that he was a member or affiliate of an organization advocating the forceful overthrow of the Government. Such a provision rests its claim to legality upon one basic assumption . . . that the 'plenary' power of Congress to deport resident aliens is unaffected by the guarantee of substantive freedoms contained in the Bill of Rights. . . . From this premise it follows that Congress may constitutionally deport aliens for whatever reasons it may choose, *limited only by the due process requirement of a fair hearing*. . . . I am unable to believe that the Constitution sanctions that assumption or the consequences that logically and inevitably flow from its application.

Bridges, 65 S.Ct. at 1455 (emphasis added).

In *Wong Yang Sung v. McGrath*, 70 S.Ct. 445, 94 L.Ed. 616 (1950), this Honorable Court, in holding that administrative hearings in deportation cases must conform to requirements of the Administrative Procedure Act (hereinafter "APA") of June 11, 1946, addressed the Government's

position that there is no requirement for any hearing or adjudication in the statute authorizing deportation (8 U.S.C. § 155(a)) and that such an omission shields the proceedings from the APA. *Wong Yang Sung v. McGrath*, 339 U.S. 33, 70 S.Ct. 445, 453, 94 L.Ed. 616 (1950). This Honorable Court rejected the Government's position by stating that "[a]ny argument premised on the proposition that the deportation statute does not require a hearing is that, without such hearing, there would be no constitutional authority for deportation." *Id.* at 454. The constitutional requirement of due process of law originates from the same source as Congress' power to legislate. *Id.* "It was under compulsion of the Constitution that this Court long ago held that an antecedent deportation statute must provide a hearing at least for aliens who had not entered clandestinely and who had been here some time *even if illegally*." *Id.* (emphasis added). Furthermore, this Honorable Court enunciated that it would hardly attribute to Congress a purpose to be less scrupulous about the fairness of a hearing necessitated by the Constitution than one granted by the Constitution as a matter of expediency. *Id.* Lastly, "[w]hen the Constitution requires a hearing, it requires a fair one, one before a tribunal which meets at least currently prevailing standards of impartiality," and that a deportation hearing involves issues basic to human liberty and happiness and perhaps to life itself. *Wong Yang Sung v. McGrath*, 339 U.S. 33, 70 S.Ct. 445, 94 L.Ed. 616 (1950).

Factually similar to the case at bar, *Yamataya v. Fisher*, 189 U.S. 86, 23 S.Ct. 611, 47 L.Ed. 721 (1903) (the "Japanese Immigrant Case") presented a Japanese alien inspected by an immigration inspector who determined that the alien arrived in violation of the law. *Yamataya*, 23 S.Ct. at 611. After it was found that the alien was immediately

deportable without a hearing pursuant to the Act of March 3d, 1891 (26 Stat. at L. 1085, chap. 551, U.S. Comp. Stat. 1901), this Honorable Court stated that it had never held that administrative officers, when executing the provisions of a statute involving the liberty of persons, can disregard the fundamental principles that inhere in due process of law; one of these principles is that no person shall be deprived of his liberty without opportunity to be heard, before administrative officers, in respect of the matters upon which that liberty depends. *Id.* This Honorable Court held that it was not competent for any executive officer, at any time within the year limited by the statute, to arbitrarily cause an alien who had entered the country and had become subject to its jurisdiction and a part of its population, although alleged to be illegally here, to be taken into custody and deported without giving him all opportunity to be heard upon the questions involving his right to be and remain in the country. *Id.* at 614-615.

A. The Seventh Circuit Court of Appeals Holds That Removal Without A Hearing Does Not Violate Petitioner's Fifth Amendment Right To Due Process

The court of appeals agreed with the Petitioner that he was correct in asserting that illegal aliens are "persons" within the meaning of the Fifth and Fourteenth Amendment Due Process Clauses. (App. 7a). However, the court decided to look into the Petitioner's claim only to the extent of whether the reinstatement order was properly entered. (App. 8a). Specifically, the court mentioned the minimization of jurisdiction: "We agree with other circuits that have considered the question that our jurisdiction in such an instance extends only to the question whether the

reinstatement order was properly entered; we cannot look beyond that order . . . " (App. 8a). Thus, irrespective of the Petitioner's right to a full and fair hearing, the court of appeals decided to merely analyze the reinstatement procedure. And, by minimizing the due process evaluation, the court of appeals ignored the precedent of such cases as *Reno v. Flores* (entitlement to due process of law in deportation proceeding), *Zadvydas* (proceedings to conform with traditional standards of fairness encompassed in due process of law), *Wong Yang Sung v. McGrath* (deportation statute must provide a hearing at least for aliens who had not entered clandestinely and who had been here some time, even if illegally), as noted *supra*.

Furthermore, the court of appeals attempted to weigh the interests of the Petitioner against those of the Government. (App. 8a-9a). It stated that the Government had a "compelling" and "strong federal" interest in the efficient administration of immigration laws and removal of "foreigners" who have no right to be here. (App. 8a). Against such a weighty governmental interest was Petitioner's liberty interest in remaining in the country, which was dismissed by the court of appeals since Petitioner "c[ould] have no liberty interest in remaining in violation of applicable United States law." (App. 8a). The court of appeals, however, did not stop at the point of dismissing Petitioner's liberty interest; it further stated that the reinstatement process by an immigration inspector is to be measured by whether the official abided by the Constitution. (App. 9a). Without directly addressing the issue, it is assumed that the court of appeals found that the removal procedure without a hearing did not violate the Petitioner's due process rights. (App. 9a-10a). Hence, the court of appeals minimized the due process evaluation to the

reinstatement procedure itself, and did not take into account the full amount of Petitioner's due process rights as contemplated in *Reno v. Flores*, *Zadvydas*, *Wong Yang Sung*, and *Yamataya*, discussed *supra*.

Lastly, the court of appeals did not fully address the constitutional ramifications of the Petitioner's adjudication by immigration officers. That is, in both the initial removal order and the reinstatement order, Petitioner was quickly disposed of, albeit semi-judicially, by immigration officers – not an immigration judge or any other judicial entity. Although the court of appeals limited the due process analysis to the reinstatement procedure itself (*See* App. 8a), attention to the Petitioner's specific scenario of immigration officers adjudicating his removal and reinstatement may have triggered due process violations.

B. The Ninth Circuit Court of Appeals' Position On the Reinstatement Process

The Ninth Circuit has held that it is well established that the Due Process Clause applies to protect immigrants in deportation proceedings, and moreover that due process for an immigrant threatened with deportation includes the right to a full and fair hearing. *Getachew v. INS*, 25 F.3d 841 (9th Cir. 1994) (*citing Landon v. Plasencia*, 459 U.S. 21, 103 S.Ct. 321, 74 L.Ed.2d 21 (1982); *Castillo-Villagra v. INS*, 972 F.2d 1017, 1028 (9th Cir. 1992)). Furthermore, the "fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." *Id.* (*quoting Mathews v. Eldridge*, 424 U.S. 319, 333, 47 L.Ed.2d 18, 96 S.Ct. 893 (1976). In *Castro-Cortez v. INS*, 239 F.3d 1037 (9th Cir. 2001), the court stated that "we seriously doubt that the government's new

reinstatement procedure [the use of Immigration Officers to determine whether to reinstate removal orders] comports with the Due Process Clause." *Castro-Cortez v. INS*, 239 F.3d 1037, 1040 (9th Cir. 2001). Although the court did not need to decide the question of whether the reinstatement procedure comports with the Due Process Clause, it did provide an elaborate discussion on 8 U.S.C. § 1231(a)(5):

> Not only are aliens subject to reinstatement denied the opportunity to appear before an impartial decision-maker, but the regulations do not provide them with access to counsel. . . . Denial of th[e] right [to place information into the administrative record] not only jeopardizes the chances for a fair determination initially, but it hampers our review of the INS decision. The INA precludes us from considering facts not in the administrative record, INA § 242(b)(4), and it also prohibits us from rendering this matter to the district court for fact-finding. INA § 242(a)(1). . . . The contention that this procedure comports with fundamental notions of due process is difficult for us to comprehend.

Castro-Cortez, 239 F.3d at 1049-1050.

It should be noted that in a subsequent case, the Court of Appeals for the Ninth Circuit, although rejecting a challenge by an alien who collaterally attacked his reinstated deportation order on the basis that the reinstatement statute and regulations violated due process, upheld the Attorney General's reinstatement because that alien *had a hearing prior to his deportation*. *Alvarenga-Villalobos v. Ashcroft*, 271 F.3d 1169 (9th Cir. 2001) (emphasis supplied). Because that alien did have a prior hearing, the court reasoned that "preclud[ing] a second

bite at the apple after illegal reentry does not offend due process." *Id.* at 1174. However, the situation in the case at bar is in contrast to *Alvarenga* since the Petitioner here has *never* had any type of hearing. Petitioner's adjudication was merely performed by immigration officers. *See generally* (App. 2a-3a).

From the foregoing, it is clear that the Seventh Circuit Court of Appeals' conclusion of the validity of the reinstatement process is at odds with the Ninth Circuit Court of Appeals' determination that the reinstatement process most likely does not comport with due process. *See Castro-Cortez*, 239 F.3d at 1049-1050. In addition, the absence of any hearing in the Petitioner's scenario is not comparable to the situation in *Alvarenga*; since Petitioner has never been granted a hearing, this is not a situation where the Petitioner is precluded from "a second bite at the apple after illegal reentry," thereby not offending due process. *See Alvarenga*, 271 F.3d at 1174. Hence, Petitioner's reinstatement procedure may have offended due process.

CONCLUSION

THEREFORE, Petitioner RUBEN GOMEZ-CHAVEZ requests this Honorable Court to GRANT his Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

Respectfully Submitted,

TAHER KAMELI, ESQ.
LAW OFFICES OF KAMELI & ASSOCIATES, P.C.
220 South State Street
Suite 2026
Chicago, Illinois 60604
(312) 427-4529

Attorney for Petitioner

In The
Supreme Court of the United States

RUBEN GOMEZ-CHAVEZ,

Petitioner,

v.

BRIAN PERRYMAN, District Director,
and the
IMMIGRATION AND NATURALIZATION SERVICE,

Respondents.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit

APPENDIX

In the

United States Court of Appeals

For the Seventh Circuit

Nos. 01-3068, 01-3454

RUBEN GOMEZ-CHAVEZ,

Plaintiff-Appellant,
Petitioner-Appellant,

v.

BRIAN PERRYMAN, DISTRICT DIRECTOR,

Defendant-Appellee,

and

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent-Appellee.

Appeals from the United States District Court
for the Northern District of Illinois, Eastern Division
No. 01-C-5768 – **Suzanne B. Conlon**, *Judge.*

Petition to Review Decision of the
Immigration and Naturalization Service.
File No. A 75 897-228.

Argued January 24, 2002 – Decided October 24, 2002

Before EASTERBROOK, RIPPLE, and DIANE P. WOOD, *Circuit Judges.*

DIANE P. WOOD, *Circuit Judge*. Ruben Gomez-Chavez entered the United States illegally some time after he had been summarily removed from the country and ordered not to return for a period of five years. When the INS learned that he was back, it reinstated the earlier order of removal, which then triggered an even more streamlined new removal process. After some procedural confusion, we granted a stay of the new order pending the result of this appeal. We now affirm the decision of the district court.

I

Gomez-Chavez, a Mexican national, was detained on January 30, 1999, while attempting to enter the United States unlawfully with a fraudulent passport. He was placed in expedited removal proceedings pursuant to 8 U.S.C. § 1225(b)(1) and charged with being inadmissible as a noncitizen. In a proceeding that very day before immigration inspector Ernesto Aguirre, Gomez-Chavez was asked a number of questions to determine his identity, citizenship, and admissibility. (Apparently this took place in English; Gomez-Chavez was assisted by neither an interpreter nor an attorney.) He admitted all pertinent facts, including his identity and the manner in which he had procured the fraudulent passport. Specifically, he confessed that he had purchased a birth certificate and social security card in the name of Carmelo Hernandez for $800. He then used the documents to obtain a passport. On this basis, the INS found him ineligible for admission to the United States and barred him from entering without the Attorney General's consent for a period of five years. The removal was conducted pursuant to § 1225(b)(1), which permits immigration officers to order aliens removed without further hearings or review unless the alien indicates an

intention to apply for asylum. Gomez-Chavez was deported on that day, January 30, 1999, without ever receiving a full-blown administrative hearing.

These proceedings did not make much of an impression on him, because less than a month after his removal, Gomez-Chavez reentered the United States. He did so even though he had signed documents warning him that an unauthorized reentry would put him at risk of a criminal prosecution, and subsequent sentence of two to twenty years in prison and fines up to $250,000. On March 5, 1999, he married Sonia Martinez, a United States citizen. Two months later, Martinez filed a Form I-30 with the INS seeking to classify Gomez-Chavez as an immediate family member. At the same time, Martinez and Gomez-Chavez also filed a form I-485 application to adjust Gomez-Chavez's status to that of an alien lawfully admitted for permanent residence. Despite the existence of the January 30 removal order (about which it seemed to be unaware), on June 1, 1999, the INS issued an Employment Authorization Card to Gomez-Chavez and renewed the card twice, on April 20, 2000, and April 5, 2001.

On July 18, 2001, Gomez-Chavez and Martinez attended an interview conducted by the INS in conjunction with the application for adjustment of status. During the interview, the INS agent realized that Gomez-Chavez had reentered the country illegally. This led to the immediate reinstatement of the January 30 removal order, under the authority of 8 U.S.C. § 1231(a)(5), which reads as follows:

> If the Attorney General finds that an alien has reentered the United States illegally after having been removed . . . the prior order of removal is reinstated from its original date and is not subject to being reopened or reviewed, the alien is not

> eligible and may not apply for any relief under this chapter, and the alien shall be removed under the prior order at any time after the reentry.

Gomez-Chavez was released on July 19, 2001, and ordered to report back to the INS on August 2, 2001, for removal without a hearing pursuant to 8 C.F.R. § 241.8. It was at that point that he began the proceedings that have brought the case before us now, which we conclude were ineffective to avoid the current removal order.

II

In order to clarify where this case presently stands, we must review its rather messy history from the time of the July 19, 2001, order of reinstatement forward. On July 25, 2001, Gomez-Chavez filed an I-212 application with the INS for permission to *reapply* for admission into the United States after removal. He also filed a complaint for mandamus and declaratory judgment in the district court. On August 8, 2001, the district court dismissed the complaint for lack of jurisdiction, on the ground that all challenges to removals belonged only in the court of appeals upon a timely petition for review. Gomez-Chavez then promptly filed a petition for review to this court, which was docketed on August 8, 2001, and assigned Case Number 01-3068. By order of August 9, 2001, we dismissed that appeal for lack of jurisdiction. When asked to clarify, we stated that the INS "decision dated July 18, 2001, constitutes a decision of the Attorney General to execute a removal order and therefore this court's jurisdiction is barred by 8 U.S.C. § 1252(g)."

Gomez-Chavez then returned to the district court, asking it to reconsider its decision in light of this court's

ruling. At that time, he also filed a motion for leave to file a first amended complaint to add a habeas corpus claim. On August 21, 2001, the district court denied his motion to reconsider and on September 7, 2001, it denied his motion for leave to file a first amended complaint. This time, when Gomez-Chavez filed his notice of appeal, we granted a stay of his deportation pending the results of this appeal.

Although the district court was clearly correct to reject Gomez-Chavez's efforts to proceed by way of mandamus, declaratory judgment, and habeas corpus, it was also correct earlier when it told Gomez-Chavez that his challenge to the INS's removal order belonged in this court. What should have happened then, in Appeal No. 01-3068, is an examination of the arguments Gomez-Chavez was making to see if he was really challenging only the removal order, or if his appeal raised issues not covered by § 1252(g). Although the 1996 Amendments generally foreclosed judicial review of deportation orders by way of habeas corpus in the district court, in certain cases aliens may petition the court of appeals directly for review of INS removal determinations. *LaGuerre v. Reno,* 164 F.3d 1035, 1038-40 (7th Cir. 1998). This is true even if, as in Gomez-Chavez's case, there was never a hearing before an immigration judge or the district court. *Id.* Thus, Gomez-Chavez was entitled to petition this court for review of the July 19 order reinstating the order of removal. We think that the best way to remedy this problem is to recall the mandate in No. 01-3068, and re-open that appeal. With respect to the present appeal, No. 01-3454, we affirm the district court's judgment.

III

Although these steps bring the merits of Gomez-Chavez's appeal before us, we conclude that nothing he has presented entitles him to relief from the INS's order. Gomez-Chavez's primary claim is that the INS is now improperly refusing to adjudicate his I-212 application for waiver of inadmissibility. But this argument fits squarely within the steps covered by the prohibition on judicial review found in 8 U.S.C. § 1252(g). Under § 1252(g), courts are barred from reviewing discretionary decisions to "commence proceedings, adjudicate cases, or execute removal orders." *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 482 (1999); *Chapinski v. Ziglar,* 278 F.3d 718, 721 (7th Cir. 2002); *Singh v. Reno,* 182 F.3d 504, 508-09 (7th Cir. 1999). These strict limitations apply not only to the Attorney General's positive actions, but also to his refusals to take action. *Alvidres-Reyes v. Reno,* 180 F.3d 199, 205 (5th Cir. 1999). An alien attempting to achieve judicial review of such discretionary measures may not avoid the § 1252(g) bar by the simple expedient of recharacterizing a claim as one challenging a refusal to act. *Cardoso v. Reno,* 216 F.3d 512, 516 (5th Cir. 2000).

Although § 1252(g) bars Gomez-Chavez from obtaining an order commanding the INS to adjust his status or precluding his removal, this does not mean that the courts have ceased to exist for cases in which a true miscarriage of justice may be occurring. *LaGuerre v. Reno,* 164 F.3d at 1040. For example, the Supreme Court held in *INS v. St. Cyr,* 533 U.S. 289 (2001), that the district courts continue to have jurisdiction under 28 U.S.C. § 2241 to entertain habeas corpus petitions based on pure questions of law. Furthermore, the observation in this court's decision in *Yang v. INS,* 109 F.3d 1185 (7th Cir. 1997), remains true:

the review-preclusion provisions in the 1996 amendments to the immigration laws do not preclude the court of appeals from determining whether the alien is being removed for a permissible reason. Thus, the agency does not have the "final say on constitutional matters"; instead, that power rests with the courts. *Singh,* 182 F.3d at 510. Following this line of cases, Gomez-Chavez argues that the removal without a hearing violates his due process rights under the Fifth Amendment.

As a preliminary matter, we note that Gomez-Chavez is unquestionably correct when he asserts that aliens, even those illegally present in the United States, are "persons" within the meaning of the Fifth and Fourteenth Amendment due process clauses. See *Zadvydas v. Davis,* 533 U.S. 678, 693 (2001) ("[A]liens who have once passed through our gates, even illegally, may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law.") (quoting *Shaughnessy v. Mezei,* 345 U.S. 206, 212 (1953)); *Plyler v. Doe,* 457 U.S. 202, 210 (1982) (rejecting argument that undocumented aliens, because of their immigration status, are not covered by the Fourteenth Amendment, and observing that "[w]hatever his status under the immigration laws, an alien is surely a 'person' in any ordinary sense of the term. Aliens, even aliens whose presence in this country is unlawful, have long been recognized as 'persons' guaranteed due process of law by the Fifth and Fourteenth Amendments."); *Hampton v. Mow Sun Wong,* 426 U.S. 88, 101-02 (1976) (striking down Civil Service Commission regulations excluding lawful resident aliens from most federal service, as a violation of the Fifth Amendment's due process clause); *Galvan v. Press,* 347 U.S. 522, 530-31 (1954) (upholding a statute requiring deportation of

aliens who had been members of the Communist Party, but reaffirming the proposition that "the Executive Branch of the Government must respect the procedural safeguards of due process" when it implements policies relating to aliens). The key question for almost all due process problems, however, is how much in the way of formalities is required in the particular situation before the court. See, *e.g., Mathews v. Eldridge,* 424 U.S. 319, 334-35 (1976).

Here, it is important to bear in mind that we are dealing with immigration policy, which has traditionally been the province of the political branches. The United States has a compelling interest in the efficient and evenhanded administration of the laws regulating the admission of foreigners to this country and, in cases where it becomes necessary, removal of anyone who had no right to be here, or who has forfeited that right by his or her conduct. Balanced against that strong federal interest is Gomez-Chavez's liberty interest in remaining in the United States and the probability of error. But he can have no liberty interest in remaining in violation of applicable United States law. Furthermore, it is important that in this case we are dealing with an order reinstating a prior order of removal. We agree with the other circuits that have considered the question that our jurisdiction in such an instance extends only to the question whether the reinstatement order was properly entered; we cannot look behind that order to the underlying removal order. See *Ojeda-Terrazas v. Ashcroft,* 290 F.3d 292, 295 (5th Cir. 2002) (adopting this rule and citing cases from other circuits).

A reinstatement procedure is quite limited in scope, and thus does not require elaborate procedures. The INS must determine only (1) the identity of the alien, (2)

whether she was subject to a prior removal order, and (3) the terms on which she left and reentered the country. Gomez-Chavez does not dispute that all three of these matters were ascertained, and ascertained accurately, at the July 18 proceeding. He argues instead that the reinstatement process is unconstitutional because the determinations are made not by judicial officials, but by administrative officials.

Gomez-Chavez has not, however, given a complete description of the process. True, it is an INS administrative official who determines whether the reinstatement criteria are met, but after the agency has acted, the alien is entitled to direct judicial review in the court of appeals. This is hardly an unusual pattern, even if the agency processes here were more truncated than many. Although we may not grant immigration inspectors the same fact-finding deference as we would immigration judges, there is a presumption that the immigration inspectors are not biased. *Marcello v. Bonds,* 349 U.S. 302, 313-14 (1955). In either case we look to see if the official abided by the agency rules as well as the Constitution. We need not decide what kind of procedures would have been necessary if, upon the INS official's apparent discovery of irregularities in Gomez-Chavez's situation, he had immediately challenged the accuracy of that determination (for example, by arguing that the official had the wrong person, or that the five-year time period had run, or that he had obtained the Attorney General's permission, etc.). If these points come up only on appeal, because of the summary nature of the initial proceeding, it may still not be too late to explore the facts. The Ninth Circuit has adopted a procedure, which the INS urges us to approve as well, under which a case with disputed facts may be transferred

to the district court pursuant to 28 U.S.C. § 2347(b)(3) for a hearing. See *Gallo-Alvarez v. Ashcroft*, 266 F.3d 1123, 1129 (9th Cir. 2001).

This case is not the one in which we need to decide whether the method supported by the *Gallo-Alvarez* court is the best way to address problems with the reinstatement proceeding, or if other steps might be preferable. Here, no additional fact-finding is necessary, because there are simply no disputed facts that could make a difference for Gomez-Chavez. At argument Gomez-Chavez's counsel admitted that the sole reason for requesting a hearing at this time was to obtain a waiver under I-212 from the removal proceedings. If his I-212 application were approved, then Gomez-Chavez could have his I-485 application for adjustment of status renewed. But the INS was entitled to proceed on the basis of the earlier order and to avoid rewarding Gomez-Chavez for his illegal reentry (which it facilitated for a time by granting work permits, before it detected the problem). Gomez-Chavez remains removable despite his I-212 application.

IV

We note finally that the INS conceded at oral argument that one legitimate avenue remains for Gomez-Chavez. The Attorney General has the power, conferred by 8 U.S.C. § 1182(a)(9)(B)(v), to waive the statute's general prohibition upon readmission to the United States for aliens subject to an order of removal, if the person is the spouse or child of a U.S. citizen or lawful permanent resident alien, and if the refusal of admission "would result in extreme hardship to the citizen or lawfully resident spouse or parent of such alien." *Id.* The Attorney

General has sole and unreviewable discretion to grant any such waiver. Nonetheless, according to INS counsel, Gomez-Chavez would be able to apply for a waiver from a location outside the United States, and we have no way of knowing how the Attorney General might respond.

We therefore recall the mandate in our prior order in this matter, No. 01-3068, and reinstate that appeal. On the merits, we decline to disturb the INS order reinstating the removal order and requiring Gomez-Chavez's immediate departure from the United States. We also AFFIRM the district court's order in No. 01-3454 dismissing the complaint.

A true Copy:

Teste:

Clerk of the United States Court
of Appeals for the Seventh Circuit

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

JUDGMENT – WITH ORAL ARGUMENT

Date: October 24, 2002

BEFORE: Honorable FRANK H. EASTERBROOK,
Circuit Judge

Honorable KENNETH F. RIPPLE,
Circuit Judge

Honorable DIANE P. WOOD, Circuit Judge

Nos. 01-3068 & 01-3454*

RUBEN GOMEZ-CHAVEZ,
Plaintiff-Appellant,
Petitioner-Appellant,

v.

BRIAN PERRYMAN, District Director,
Defendant-Appellee,

and

IMMIGRATION AND NATURALIZATION SERVICE,
Respondent-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division, No. 01 C 5768, Suzanne B. Conlon, Judge

and

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* Appeal no. 01-3068 was submitted.

Petition for Review of an order of the Board of Immigration Appeals No. A-75-897-228

We therefore recall the mandate in our prior order in this matter, appeal no. 01-3068, and reinstate that appeal. On the merits, we decline to disturb the INS order reinstating the removal order and requiring Gomez-Chavez's immediate departure from the United States. We also AFFIRM, with costs, the district court's order in appeal no. 01-3454 dismissing the complaint. The above is in accordance with the decision of this court entered on this date.

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

November 18, 2002

Before

Hon. FRANK H. EASTERBROOK, *Circuit Judge*

Hon. KENNETH F. RIPPLE, *Circuit Judge*

Hon. DIANE P. WOOD, *Circuit Judge*

Nos. 01-3068 & 01-3454

RUBEN GOMEZ-CHAVEZ,
Plaintiff-Appellant,
Petitioner-Appellant,

v.

BRIAN PERRYMAN,
District Director,
Defendant-Appellee,

and

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 01-C-5768

Suzanne B. Conlon,
Judge.

Petition to Review Decision of the Immigration and Naturalization Service.

INS File No. A 75 897-228

ORDER

The opinion of this court issued on October 24, 2002, is amended to read as follows:

(1) Page 4, first full paragraph, line 12 to 13, "notice of appeal from that decision" is changed to "petition for review."

(2) Page 4, first full paragraph, line 15, "appeal" is changed to "petition."

(3) Page 5, first full paragraph, line 6, "Appeal" is changed to "Case."

(4) Page 5, first full paragraph, line 9, "appeal" is changed to "petition for review."

(5) Page 5, first full paragraph, line 21 to 22, "appeal" is changed to "petition."

(6) Page 5, first full paragraph under heading III, line 2, "appeal" is changed to "petition for review."

(7) Page 9, line 11 from the top, "on appeal" is changed to "in a petition for review."

(8) Page 10, second paragraph, line 2, "appeal" is changed to "petition for review."

SO ORDERED.

U.S. Department of Justice
Immigration and Naturalization Service

Notice of Intent/Decision to Reinstate Prior Order

File No. A 75 897 228
Date July 18, 2001

Name: Ruben GOMEZ-Chavez

In accordance with section 241(a)(5) of the Immigration and Nationality Act (Act) and 8 CFR 241.8, you are hereby notified that the Attorney General intends to reinstate the order of Removal (Deportation/exclusion/removal) entered against you. This intent is based on the following determinations:

1. You are an alien subject to a prior order of deportation/exclusion/removal entered on 01/30/99 at Dallas, Tx.
(Date) (Location)

2. You have been identified as an alien who:

☒ was removed on 01/30/99 (Date) pursuant to an order of deportation/exclusion/removal.

☐ departed voluntarily on _____ (Date) pursuant to an order of deportation/exclusion/removal on or after the date on which such order took effect (i.e., who self-deported).

3. You illegally reentered the United States on or about 2/23/99 at or near El Paso, TX.
(Date) (Location)

In accordance with Section 241(a)(5) of the Act, you are removable as an alien who has illegally reentered the United states after having been previously removed or departed voluntarily while under an order of exclusion,

deportation or removal and are therefore subject to removal by reinstatement of the prior order. You may contest this determination by making a written or oral statement to an immigration officer. You do not have a right to a hearing before an immigration judge.

The facts that formed the basis of this determination, and the existence of a right to make a written or oral statement contesting this determination, were communicated to the alien in the English *language.*

Deborah M. Walton, DO	/s/ Debora M. Walton
(Printed or typed name of official)	(Signature of officer)
	Deportation Officer
	(Title of officer)

Acknowledgment and Response

I ☒ do ☐ do not wish to make a statement contesting this determination.

7/18/02	/s/ Ruben Gomez
(Date)	(Signature of Alien)

Decision, Order and Officer's Certification

Having reviewed all available evidence, the administrative file and any statements made or submitted in rebuttal, I have determined that the above-named alien is subject to removal through reinstatement of the prior order, in accordance with section 241(a)(5) of the Act.

7-19-01	Chicago, Illinois	/s/ Deborah Achim
Date	(Location)	(Signature of authorized deciding INS official)
Deborah Achim		Assistant District Director/DRO
(Printed or typed name of official)		(Title)

U.S. Department of Justice
Immigration and
Naturalization Service

Notice: Order of Expedited Removal

DETERMINATION OF INADMISSIBILITY

File No: *A75 897 228*

Date: *01/30/1999*

In the Matter of: *GOMEZ-CHAVEZ, RUBEN*

Pursuant to section 235(b)(1) of the Immigration and Nationality Act (Act), (8 U.S.C. 1225(b)(1)), the Immigration and Naturalization Service has determined that you are inadmissible to the United States under section(s) 212(a) ☐ (6)(C)(i); ☒ (6)(C)(ii); ☐ (7)(A)(i)(I); ☐ (7)(A)(i)(II); ☐ (7)(B)(i)(I); and/or ☐ (7)(B)(i)(II) of the Act, as amended, and therefore are subject to removal, in that:

You are ineligible for admission to the United States because: On or about 1/30/99, you falsely represented yourself to be a citizen of the United States for the purpose or benefit under the Immigration and Nationality Act (including Section 274A) or any other Federal or State law, to wit: a U.S. passport in the name of Carmelo Hernandez which you obtained by fraud.

ERNESTO AGUIRRE
SENIOR IMMIGRATION INSP
Name and Title of Immigration Officer (Print)

/s/ Ernesto Aguirre, Sr.
Signature of Immigration Officer

ORDER OF REMOVAL
UNDER SECTION 235(b)(1) OF THE ACT

Based upon the determination set forth above and evidence presented during inspection or examination pursuant to section 235 of the Act, and by the authority contained in section 235(b)(1) of the Act, you are found to be inadmissible as charged and ordered removed from the United States.

/s/ Ernesto Aguirre Sr. Name and Title of Immigration Officer (Print)	/s/ Ernesto Aguirre Sr. Signature of Immigration Officer
/s/ G. Bevans A.P.D. Name and Title of Supervisor (Print)	_____ Signature of Supervisor, if available

☒ Check here if supervisory concurrence was obtained by telephone or other means (no supervisor on duty).

CERTIFICATE OF SERVICE

I personally served the original of this notice upon the above named person on 1-30-99 (Date).

/s/ Ernesto Aguirre Sr.
Signature of Immigration Officer

United States District Court
Northern District of Illinois
Eastern Division

GOMEZ-CHAVEZ

v.

PERRYMAN

JUDGMENT IN A CIVIL CASE

Case Number: 01 C 5768

JUDGE CONLON

☐ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury rendered its verdict.

■ Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS HEREBY ORDERED AND ADJUDGED that this case is dismissed for lack of jurisdiction.

Michael W. Dobbins, Clerk of Court

Date: 8/8/2001

/s/ Sonya Banks [sbe]
Sonya Banks, Deputy Clerk

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

December 11, 2002

Before

Hon. FRANK H. EASTERBROOK, Circuit Judge

Hon. KENNETH F. RIPPLE, *Circuit Judge*

Hon. DIANE P. WOOD, *Circuit Judge*

Nos. 01-3068 & 01-3454	] Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
RUBEN GOMEZ-CHAVEZ, *Plaintiff-Appellant, Petitioner,*	]
v.	]
BRIAN PERRYMAN, District Director, *Defendant-Appellee,*	] No. 01-C-5768
and	] Suzanne B. Conlon, Judge.
IMMIGRATION AND NATURALIZATION SERVICE,	] Petition to Review Decision of the Immigration and Naturalization Service.
Respondent.	] INS File No. A 75-897-228

ORDER

On consideration of the petition for rehearing filed by the attorneys for Petitioner-Appellant on November 25, 2002, all members of the panel have voted to **DENY** rehearing.

TEXT OF RELEVANT PROVISIONS, STATUTES, AND REGULATIONS

I. The relevant constitutional provisions involved in the case, pursuant to Supreme Court Rule 14(1)(f), include:

The Fifth Amendment to the United States Constitution:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

II. The relevant statutes involved in the case, pursuant to Supreme Court Rule 14(1)(f), include:

8 U.S.C. § 1225(b)(1)(A)(i):

(b) Inspection of applicants for admission

(1) Inspection of aliens arriving in the United States and certain other aliens who have not been admitted or paroled

(A) Screening

(i) In general

If an immigration officer determines that an alien (other than an alien described in subparagraph (F)) who is arriving in

> the United States or is described in clause (iii) is inadmissible under section 1182(a)(6)(C) or 1182(a)(7) of this title, the officer shall order the alien removed from the United States without further hearing or review unless the alien indicates either an intention to apply for asylum under section 1158 of this title or a fear of persecution.

8 U.S.C. § 1231(a)(5):

> If the Attorney General finds that an alien has reentered the United States illegally after having been removed or having departed voluntarily, under an order of removal, the prior order of removal is reinstated from its original date and is not subject to being reopened or reviewed, the alien is not eligible and may not apply for any relief under this act, and the alien shall be removed under the prior order at any time after the reentry.

8 U.S.C. § 1252(g):

> Except as provided in this section and notwithstanding any other provision of law, no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this chapter.

28 U.S.C. § 1331:

> The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 U.S.C. § 1361:

> The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the Plaintiff.

III. The relevant regulations involved in the case, pursuant to Supreme Court Rule 14(1)(f), include:

8 C.F.R. § 241.8(a), (b), and (c):

> (a) Applicability. An alien who illegally reenters the United States after having been removed, or departed voluntarily, while under an order of exclusion, deportation, or removal shall be removed from the United States by reinstating the prior order. The alien has no right to a hearing before an immigration judge in such circumstances. In establishing whether an alien is subject to this section, the immigration officer shall determine the following:
>
> > (1) Whether the alien has been subject to a prior order of removal. The immigration officer must obtain the prior order of exclusion, deportation, or removal relating to the alien.
> >
> > (2) The identity of the alien, i.e., whether the alien is in fact an alien who was previously removed, or who departed voluntarily while under an order of exclusion, deportation, or removal. In disputed cases, verification of identity shall be accomplished by a

comparison of fingerprints between those of the previously excluded, deported, or removed alien contained in Service records and those of the subject alien. In the absence of fingerprints in a disputed case the alien shall not be removed pursuant to this paragraph.

(3) Whether the alien unlawfully reentered the United States. In making this determination, the officer shall consider all relevant evidence, including statements made by the alien and any evidence in the alien's possession. The immigration officer shall attempt to verify an alien's claim, if any, that he or she was lawfully admitted, which shall include a check of Service data systems available to the officer.

(b) Notice. If an officer determines that an alien is subject to removal under this Section, he or she shall provide the alien with written notice of his or her determination. The officer shall advise the alien that he or she may make a written or oral statement contesting the determination. If the alien wishes to make such a statement, the officer shall allow the alien to do so and shall consider whether the alien's statement warrants reconsideration of the determination.

(c) Order. If the requirements of paragraph (a) of this section are met, the alien shall be removed under the previous order of exclusion, deportation, or removal in accordance with section 241(a)(5) of the Act.

Supreme Court, U.S.
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No. 02-1529

In the Supreme Court of the United States

RUBEN GOMEZ-CHAVEZ, PETITIONER

v.

DEBORAH ACHIM, INTERIM FIELD OFFICE DIRECTOR FOR DETENTION AND REMOVAL, BUREAU OF IMMIGRATION AND CUSTOMS ENFORCEMENT, AND JOHN ASHCROFT, ATTORNEY GENERAL OF THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals erred in considering petitioner's constitutional challenge to the reinstatement of an order of removal from the United States in the context of petitioner's petition for review of the reinstatement order, without also addressing the same claim in the context of petitioner's appeal from the district court's dismissal of petitioner's complaint challenging the reinstatement order.

2. Whether the reinstatement, under 8 U.S.C. 1231(a)(5), of an earlier order of removal from the United States that had been entered against petitioner denied petitioner due process.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) is reported at 308 F.3d 796. The order of the district court dismissing petitioner's complaint (Pet. App. 21a) is unreported. The decision of the Immigration and Naturalization Service reinstating petitioner's removal order (Pet. App. 16a-18a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 24, 2002. A petition for rehearing was denied on December 11, 2002 (Pet. App. 22a). The petition for a writ of certiorari was filed on March 10, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. Congress has established procedures to expedite the removal from the United States of aliens who reenter the country unlawfully after previously being removed. The Immigration and Nationality Act, 8 U.S.C. 1231(a)(5), provides:

> If the Attorney General finds that an alien has reentered the United States illegally after having been removed or having departed voluntarily, under an order of removal, the prior order of removal is reinstated from its original date and is not subject to being reopened or reviewed, the alien is not eligible and may not apply for any relief under this chapter, and the alien shall be removed under the prior order at any time after the reentry.

Because Congress specified that the alien's original order of removal "is not subject to being reopened or reviewed" and the alien is not eligible for relief from removal, the administrative regulations that implement Section 1231(a)(5) provide that aliens subject to reinstatement have no right to a hearing before an immigration judge. 8 C.F.R. 241.8(a); see 62 Fed. Reg. 10,326 (1997). However, an earlier removal order will be reinstated only after an immigration officer establishes the identity of the alien, that the alien is subject to a prior order of removal, that he was removed or

departed voluntarily while under the prior order, and that the alien reentered the United States unlawfully. 8 C.F.R. 241.8(a). The alien is given notice of the immigration officer's determinations and an opportunity to seek reconsideration by the officer. 8 C.F.R. 241.8(b). Aliens who allege that they will be persecuted or tortured if returned to their country of removal are provided an opportunity to seek protection from removal on those grounds. 8 C.F.R. 241.8(e).

b. Just as Congress established the reinstatement procedure to allow swift removal of aliens who clearly lack a right to reenter the United States, it established an expedited procedure to allow swift removal of aliens who clearly lack a right to enter the United States in the first place. Under 8 U.S.C. 1225(b)(1), an immigration officer who determines that an arriving alien is inadmissible to the United States due to immigration fraud or the absence of valid immigration documents "shall order the alien removed from the United States without further hearing or review." 8 U.S.C. 1225(b)(1)(A)(i). The expedited removal procedure does not apply to asylum-seekers or persons who claim to be citizens or lawful permanent residents of the United States, or to have been granted asylum. 8 U.S.C. 1225(b)(1)(A) and (C); 8 C.F.R. 235.3(b)(4) and (5).

Before ordering an alien removed from the United States under the expedited removal provision, the immigration officer must create a record of the facts of the case and the alien's statements. The alien may correct the record of his statements. Interpretive assistance is used if necessary to communicate with the alien. 8 C.F.R. 235.3(b)(2)(i). Each expedited removal order prepared by an immigration officer must be

reviewed and approved by a supervisor before it becomes final. 8 C.F.R. 235.3(b)(7).[1]

2. Petitioner is a national of Mexico. In January 1999, he was stopped at the border when he attempted to enter the United States by presenting a fraudulent United States passport. Pet. App. 2a, 19a. The Immigration and Naturalization Service (INS) removed petitioner to Mexico after conducting an expedited removal proceeding under 8 U.S.C. 1225(b)(1). Pet. App. 2a-3a. The INS determined that petitioner was inadmissible to the United States for falsely claiming United States citizenship when seeking admission. *Id.* at 19a-20a; see 8 U.S.C. 1182(a)(6)(C)(ii). Petitioner admitted the relevant facts establishing his removability, including his use of a fraudulent passport. Pet. App. 2a. Petitioner was barred for a period of five years from reentering the United States without the Attorney General's permission, and warned that he would be subject to prosecution if he reentered without permission. *Id.* at 2a, 3a; see 8 U.S.C. 1326(a).

3. Within a month of his removal, petitioner crossed the Mexican border and reentered the United States unlawfully and without inspection. Pet. App. 3a, 16a. In March 1999, he married a United States citizen. *Id.* at 3a. Petitioner and his wife then filed applications

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[1] The exclusive mechanism for obtaining judicial review of individual removal orders entered under the expedited procedure of Section 1225(b)(1) is a habeas corpus proceeding. See 8 U.S.C. 1252(a)(2)(A) and (e). In such a proceeding, the court's review is limited to determining whether the individual seeking relief is an alien, whether the alien was ordered removed under Section 1225(b)(1), and whether the alien can prove by a preponderance of the evidence that he was previously admitted to the United States as a lawful permanent resident or refugee, or granted asylum. 8 U.S.C. 1252(e)(2) and (5).

with the INS that, if granted, would have allowed petitioner to become a lawful permanent resident of the United States based on his marriage. *Ibid.*

In the course of processing the applications, the INS discovered that petitioner had reentered the United States illegally after his prior removal. Pet. App. 3a. In July 2001, the INS reinstated petitioner's 1999 order of removal pursuant to 8 U.S.C. 1231(a)(5). Pet. App. 3a-4a, 16a-18a. Petitioner was released from INS custody pending his scheduled removal to Mexico. *Id.* at 4a.

4. While his removal to Mexico was still pending, petitioner petitioned the INS for permission to apply for admission to the United States after his removal. Pet. App. 4a. Petitioner also filed a complaint for a writ of mandamus and a declaratory judgment in the Northern District of Illinois. In his complaint, petitioner challenged the INS's reinstatement of his 1999 removal order and sought an injunction against his removal to Mexico. Pet. 6; Pet. App. 2a, 4a. On August 8, 2001, the district court dismissed the complaint for lack of jurisdiction, after determining that challenges to removal orders must be brought in the proper court of appeals upon a timely petition for review. Pet. App. 4a, 21a; see 8 U.S.C. 1252(b).

Petitioner then filed a petition for review of the reinstatement order in the United States Court of Appeals for the Seventh Circuit. Pet. App. 4a. On August 9, 2001, the court of appeals dismissed the petition for review because it determined that petitioner sought to challenge the Attorney General's decision to execute a removal order, and, under 8 U.S.C. 1252(g), courts lack jurisdiction to hear such challenges. Pet. App. 4a.

Petitioner then moved in the district court for reconsideration of the August 8, 2001, order of dis-

missal, and for leave to file an amended complaint adding a habeas corpus claim. On August 21, 2001, the district court denied the motion for reconsideration of the August 8 dismissal. On September 7, 2001, the district court denied petitioner's motion for leave to file an amended complaint. Pet. App. 4a-5a.

5. Petitioner appealed the district court's orders, and the court of appeals stayed petitioner's removal pending the appeal. Pet. App. 5a.[2]

In its decision, the court of appeals first determined that the district court "was clearly correct" when it dismissed petitioner's complaint and denied him leave to add a habeas corpus claim. Pet. App. 5a. The court explained that (as the district court had concluded) the statutorily authorized mechanism for obtaining review of the INS's reinstatement order is a petition for review in the court of appeals. *Ibid.*

Furthermore, the court of appeals determined that it had erred in summarily dismissing petitioner's earlier petition for review without "an examination of the arguments [petitioner] was making to see if [petitioner]

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[2] On March 1, 2003, functions of several border and security agencies, including certain functions of the former INS, were transferred to the Department of Homeland Security and assigned to its Bureau of Immigration and Customs Enforcement (ICE). See Homeland Security Act of 2002, Pub. L. No. 107-296, § 441(2), 116 Stat. 2192 (to be codified at 6 U.S.C. 251(2)). Before the reorganization, an INS official and the INS were named as the defendant/appellee in the proceeding instituted in the district court and the respondent to the petition for review, respectively, see Pet. App. 1a, 21a, and as the respondents in this Court. The correct, substituted respondents in this Court after the reorganization are the ICE Interim Field Office Director for Detention and Removal in the appeal from the district court proceeding, and the Attorney General of the United States in the petition-for-review proceeding, see 8 U.S.C. 1252(b)(3)(A).

was really challenging only the removal order, or if his appeal raised issues not covered by § 1252(g)." Pet. App. 5a. The court therefore recalled its mandate dismissing the petition for review of the INS's reinstatement order and reopened that proceeding, while affirming the district court's judgment. *Id.* at 5a, 11a-13a.

In the petition-for-review proceeding, the court of appeals concluded that petitioner is not entitled to judicial relief. Pet. App. 6a-10a. The court explained that petitioner's "primary claim" was that the INS was improperly refusing to adjudicate his application for permission to apply for admission to the United States after his removal. *Id.* at 6a. It concluded that petitioner's claim is barred by 8 U.S.C. 1252(g) because Section 1252(g), which expressly bars judicial review of claims "arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders," 8 U.S.C. 1252(g), "appl[ies] not only to the Attorney General's positive actions, but also to his refusals to take action." Pet. App. 6a. The court added that the INS was not required to "reward[] [petitioner] for his illegal reentry" by considering his application for a discretionary immigration benefit before removing petitioner from the United States. *Id.* at 10a. The court also observed that, after petitioner is removed, he may apply for discretionary relief allowing him to reenter the United States lawfully. *Id.* at 10a-11a.

The court of appeals likewise rejected petitioner's claim that his removal under the reinstatement procedures of 8 U.S.C. 1231(a)(5) and 8 C.F.R. 241.8 violates the due process guarantee of the Fifth Amendment. The court agreed with petitioner that, as an alien who accomplished an unlawful entry into the United

States, petitioner can claim some measure of due process protection. Pet. App. 7a-8a. But the court recognized a "compelling" governmental interest "in the efficient and evenhanded administration" of the immigration laws. *Id.* at 8a. Furthermore, the court emphasized that its review was limited to the 2001 reinstatement of petitioner's 1999 removal order, and that the court could not "look behind that [2001] order to the underlying [1999] removal order." *Ibid.* (citing *Ojeda-Terrazas* v. *Ashcroft*, 290 F.3d 292, 295 (5th Cir. 2002)).

The court observed that petitioner does not dispute any of the facts relevant to the reinstatement of his removal order. Pet. App. 8a-9a. And it explained that when there is a dispute about whether the requirements for reinstating a removal order are satisfied, the immigration officer's determination is subject to judicial review. *Id.* at 9a-10a; see *id.* at 6a-7a. Thus, the court found no due process violation in the fact that petitioner was ordered removed without a hearing before an immigration judge or Article III judge. *Id.* at 9a. The court noted that this case does not present the question of what judicial fact-finding procedures should be followed when a removal order is reinstated based on findings of fact that are disputed in a petition for judicial review, because "there are simply no disputed facts that could make a difference" in petitioner's case. *Id.* at 10a.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. This Court's review is not warranted.

1. Petitioner first argues (Pet. 8-10) that the court of appeals erred in affirming the district court's dismissal

of his complaint seeking a writ of mandamus and a declaratory judgment. Petitioner contends that, in affirming the district court, the court of appeals "ignored" his claim that 8 U.S.C. 1231(a)(5) is unconstitutional. Pet. 9. Petitioner's argument that the court of appeals in this case failed to address one of his contentions raises no issue of general importance that would warrant this Court's review. In any event, the court of appeals did consider and reject, in the context of the petition for review proceeding, petitioner's claim that Section 1231(a)(5) is unconstitutional. See Pet. App. 7a-10a. The court of appeals' alleged error consisted of nothing more than reviewing petitioner's claim under the rubric of his petition for review, rather than his appeal from the dismissal of his district court complaint. That procedural distinction had no apparent bearing on the court of appeals' rejection of the merits of petitioner's constitutional argument.

Petitioner further argues (Pet. 10-11) that the district court would have had jurisdiction to hear the habeas corpus claim that petitioner sought to add *after* the dismissal of his district court complaint. That argument, however, does not suggest that the district court abused its discretion by refusing to allow petitioner to make a post-judgment amendment to his complaint. And as explained above, the court of appeals *did* consider on the merits, in the petition for review proceeding, the constitutional argument that petitioner sought to present in the district court.

2. Petitioner asserts (Pet. 16-20) that the court of appeals erred when it determined that the INS's reinstatement of petitioner's removal order, without a more elaborate adjudication, did not deny him due process. He also suggests that the Seventh Circuit's resolution

of that constitutional question conflicts with decisions of the Ninth Circuit. Those contentions lack merit.

a. Petitioner does not explain how he suffered injury from the application of Section 1231(a)(5), as implemented by the INS, in his case. Petitioner does not suggest that a hearing before a judge would have resulted in a different outcome in his reinstatement proceeding, and he does not challenge the provision of Section 1231(a)(5) that renders him ineligible for discretionary relief from removal.[3] The only issue in an adjudicatory hearing would have been petitioner's removability, which in this case was established by facts that were undisputed both at the time the removal order was originally entered, and when the order was reinstated. See Pet. App. 2a, 9a, 10a. Because a hearing could not possibly make a difference in petitioner's case, he lacks standing to raise the claim that due process requires a hearing. See *Allen* v. *Wright*, 468 U.S. 737, 751 (1984) (to have Article III standing, plaintiff must allege "personal injury fairly traceable to" the alleged violation "and likely to be redressed by the requested relief").

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[3] In any event, petitioner has no constitutionally protected interest in obtaining discretionary relief from removal. Even when a statutory provision makes an alien eligible to be considered for discretionary relief, a grant of such relief is "not a matter of right under any circumstances, but rather is in all cases a matter of grace." *Jay* v. *Boyd*, 351 U.S. 345, 354 (1956). Such relief is accorded pursuant to the Attorney General's "unfettered discretion," and is akin to "a judge's power to suspend the execution of a sentence, or the President's to pardon a convict." *INS* v. *Yueh-Shaio Yang*, 519 U.S. 26, 30 (1996) (internal quotation marks omitted). Cf. *Olim* v. *Wakinekona*, 461 U.S. 238, 249 (1983) (prisoners lack constitutionally protected liberty interest in discretionary prison assignments).

Relatedly, petitioner offers no explanation of what procedural benefit a full-blown adjudicatory hearing would have provided in his case, in which the relevant facts were undisputed. Nor does petitioner show that any possible benefits from more elaborate procedures in either the initial adjudication of his removability or the reinstatement of his 1999 removal order would outweigh the government's strong interest in the timely removal of aliens who attempt to enter, or succeed in entering, the United States illegally. See generally *Fiallo* v. *Bell*, 430 U.S. 787, 792 (1977) (power to exclude or expel aliens is a "fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control") (quoting *Shaughnessy* v. *United States ex rel. Mezei*, 345 U.S. 206, 210 (1953)).

b. Contrary to petitioner's suggestion (Pet. 18-20), there is no direct conflict between the Seventh Circuit's decision in this case and Ninth Circuit decisions addressing the constitutionality of Section 1231(a)(5), as implemented by 8 C.F.R. 241.8. In *Castro-Cortez* v. *INS*, 239 F.3d 1037 (2001), on which petitioner principally relies, a Ninth Circuit panel expressed "serious doubt whether the use of Immigration Officers to determine whether to reinstate removal orders comports with due process." *Id.* at 1049. As petitioner recognizes (Pet. 19), however, that discussion was dictum, because the panel determined that Section 1231(a)(5) was not applicable in that case. See 239 F.3d at 1050.

Subsequently, in *Alvarenga-Villalobos* v. *Ashcroft*, 271 F.3d 1169 (2001), the Ninth Circuit *upheld* the reinstatement procedures of 8 C.F.R. 241.8 against a due process challenge, relying principally on the fact that the alien in that case had a "full and fair hearing" prior to the entry of the removal order that was reinstated.

271 F.3d at 1174 (emphasis deleted). The *Alvarenga-Villalobos* court expressly noted that *Castro-Cortez* did not decide the constitutionality of the INS's reinstatement procedures, *ibid.*, and that court did not address the constitutionality of Section 1231(a)(5) and the INS's implementing procedures in a situation such as this one, in which the underlying removal order was entered using the expedited removal procedures of 8 U.S.C. 1225(b)(1).[4]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JUNE 2003

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[4] In this case, petitioner admitted the facts supporting his 1999 removal order. Pet. App. 2a. Therefore, the absence of a removal hearing in 1999 would not appear to constitute a relevant distinction between petitioner's case and *Alvarenga-Villalobos*, which rejected the alien's due process challenge. It is clear, however, that the Ninth Circuit has not ruled on a due process challenge like petitioner's.

(3)

No. 02-1529

Supreme Court, U.S.
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BRIAN PERRYMAN, District Director,
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IMMIGRATION AND NATURALIZATION SERVICE,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

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8 C.F.R. § 212.2(a) 3

8 C.F.R. § 212.2(e) 3, 4, 5

8 C.F.R. § 241.8(a) 3

REPLY BRIEF FOR PETITIONER

The brief in opposition filed by the Respondents contains no effective response to Petitioner's compelling showing that certiorari is warranted in this case.

1. Respondents first contend that the claim that 8 U.S.C. § 1231(a)(5) is unconstitutional "raises no general importance that would warrant this Court's review." Respondents' Brief at 9 [hereinafter Res. ___]. Respondents further state that, "the court of appeals did consider and reject, in the context of the petition for review proceeding, Petitioner's claim that Section 1231(a)(5) is unconstitutional." Res. 9. Respondents' submission rests on the contention that the preclusion of review is unproblematic because it concerns simply a "procedural distinction." Res. 9.

As we explained in our opening brief (at 9), Petitioner was not only attempting to force the Attorney General to adjudicate his BCIS form I-212 (the mandamus count), but was also attempting to challenge the constitutionality of 8 U.S.C. § 1231(a)(5). Still, Respondents further contend that the court of appeals did consider on the merits Petitioner's constitutional argument in the petition for review proceeding. Res. 9. Yet the entire complaint was dismissed for lack of jurisdiction and affirmed by the court of appeals, which noted that Petitioner could not avoid § 1252(g)'s jurisdictional bar by recharacterizing a claim as a request for a writ of mandamus. (App. 6a). Respondents mischaracterize the review of the constitutionality of 8 U.S.C. § 1231(a)(5), precisely because there was no review, the entire complaint was dismissed for lack of jurisdiction under § 1252(g) and the constitutionality claim was ignored.

Following *Alvarenga-Villalobos v. Ashcroft*, 271 F.3d 1169 (9th Cir. 2001), a Petitioner is entitled to receive one full and fair hearing of his removal. In *Alvarenga-Villalobos*, the Petitioner had received one full and fair hearing before the Bureau of Immigration and Naturalization Services (hereinafter "BCIS"), and formally known as INS, imposed the first order of removal and therefore the court rejected his challenge to his reinstated deportation order. *Alvarenga-Villalobos*, 271 F.3d at 1169-1174. Here, the Petitioner has never had any form of judicial review of his case. In *Alvarenga-Villalobos*, the court referred to an earlier U.S. Supreme Court case, *Mendoza-Lopez*, 481 U.S. 828, 841 (1987) stating, "*Mendoza-Lopez* requires judicial review of a deportation in a subsequent proceeding only when the alien was deprived of the right to judicial review in his initial proceeding." *Alvarenga-Villalobos*, 271 F.3d at 1172 (citing *Mendoza-Lopez*, 481 U.S. 828, 841 (1987)). In the instant case, the Petitioner has been denied his right of judicial review of his claims.

2. Respondents contend that the Petitioner does not explain how injury he suffered by the application of § 1231(a)(5) Res. 10. Yet, in order to demonstrate prejudice, an alien need not show that a hearing necessarily would afford relief. *United States v. Arrieta*, 224 F.3d 1076, 1079 (9th Cir. 2000).

Furthermore, in *Alvarenga-Villalobos*, the Ninth Circuit Court of Appeals upheld the Attorney General's reinstatement because the alien *had a hearing prior to his deportation*. *Alvarenga-Villalobas v. Ashcroft*, 271 F.3d

1169 (9th Cir. 2001) (emphasis supplied).[1] In contrast Petitioner here never had any type of hearing.

In *Padilla v. Ashcroft*, No. 02-70430, 2003 WL 21499281, the alien was "inadmissible in that, following deportation [she] re-entered the United States without the permission of the Attorney General." *Padilla*, 2003 WL 21499281, *3 (9th Cir.) (Berzon, concurring). However, the concurrence states:

> A request for permission to reapply for entry, *see* 8 C.F.R. §§ 212.2(a); 212.2(e), might have cured Padilla's inadmissibility premised on her illegal reentry, but no such request was ever filed with the district director. As a result, Padilla has not shown that she was prejudiced by the failure to afford her a hearing prior to the reinstatement, because she does not identify a plausible claim for opposing removal pursuant to reinstatement.

Id.

In contrast in the instant case, on or about May 11, 1999 Petitioner's wife filed with the BCIS a from I-130 petition to classify the status of the Petitioner as an immediate family member of a United States citizen pursuant to the provisions of Section 245(a) of the Immigration

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[1] In *Padilla v. Ashcroft*, No. 02-70430, 2003 WL 21499281, the Court noted of *Alvarenga-Villalobos*: "Even assuming that *Alvarenga-Villalobos v. INS*, 271 F.3d 1169, 1174 (9th Cir.2001), interprets 8 C.F.R. § 241.8(a) to require a full and fair hearing with respect to the original order of exclusion, deportation, or removal that is being reinstated, Petitioner cannot show prejudice. That is so because, as we have emphasized above, she does not challenge her original removal; a hearing concerning it therefore could not help her." *Padilla*, 2003 WL 21499281, *3 n.2 (9th Cir.).

and Nationality Act, as amended, 8 U.S.C. § 1255(a). Simultaneously, the Petitioner and his U.S. citizen spouse filed with the BCIS a form I-485 application along with other forms to adjust Petitioner's status to that of an alien lawfully admitted for permanent residence, pursuant to the provisions of Section 245 of the aforesaid Act, 8 U.S.C. § 1255. On or about July 25, 2001 the Plaintiff filed an application for permission to reapply for admission into the United States after removal (I-212). As a result Petitioner has shown he was prejudiced by the failure to afford him a hearing prior to the reinstatement because he has identified a plausible claim for opposing removal pursuant to the reinstatement.[2]

The Respondents' claim (Res. 10) that Petitioner has not demonstrated injury from the application of Section 1231(a)(5), merely analyzes the reinstatement procedure. Yet, as noted in *Padilla*, the court in *Prado Hernandez v. Reno* held that the BCIS can and should consider on its merits a fully-perfected application for adjustment of status filed before reinstatement proceedings are instigated. *Padilla*, 2003 WL 21499281, *5 (9th Cir.) (citing *Prado Hernandez v. Reno*, 86 F.Supp.2d 1037 (W.D.Wash.1999)).

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[2] 8 C.F.R. § 212(e) states: "An applicant for adjustment of status under section 245 of the Act and part 245 of this chapter must request permission to reapply for entry in conjunction with his or her application for adjustment of status. *This request is made by filing an application for permission to reapply, Form I-212, with the district director having jurisdiction over the place where the alien resides.* If the application under section 245 of the Act has been initiated, renewed, or is pending in a proceedings before an immigration judge, the district director must refer the Form I-212 to the immigration judge for adjudication." (Emphasis added).

Just as the Petitioner in the instant case had done, the Petitioner in *Prado* had applied for adjustment of status prior to the BCIS move to reinstate the deportation order. *Id.* (citing *Prado*, 86 F.Supp.2d at 1041). The *Prado* Petitioner and his wife were interviewed by the BCIS and it was discovered that the Petitioner has previously been deported. *Prado*, 86 F.Supp.2d at 1037. The *Prado* Petitioner then submitted Form I-212, Application for Permission to Reapply for Admission into the United States After Deportation or Removal, and was released on bond. *Id.* The court in *Prado* held that, "[t]he language of Section 241(a)(5), therefore, is not bar to considering the application." *Padilla*, 2003 WL 21499281, *5 (9th Cir.) (citing *Prado*, 86 F.Supp.2d at 1041).

Under the Immigration and Naturalization Act § 245(i), non-citizens who have previously been removed from this country and subsequently reenter may nonetheless apply for adjustment of status. Consent must be obtained from the Attorney General to apply for readmission after removal under 8 C.F.R. § 212.2. The Petitioner may bring his or her adjustment application along with the application for permission to reapply, under 8 C.F.R. § 212.2, before an immigration court. 8 C.F.R. § 212.2 states, "If the application under section 245 of the Act has been initiated, renewed, or is pending in a proceeding before an immigration judge, the district director must refer the Form I-212 (Application for Permission to Reapply for Admission into the United States After Deportation or Removal) to the immigration judge for adjudication." 8 C.F.R. § 212.2(e). Therefore, the Petitioner in this instant case has demonstrated a plausible ground for relief.

CONCLUSION

For the reasons set forth above and in our opening brief, Petitioner RUBEN GOMEZ-CHAVEZ respectfully requests this Honorable Court to GRANT his Petition for a Writ of Certiorari.

Respectfully submitted,

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